PUBLIC PROSECUTOR

v.

TAN AH LING

HIGH COURT MALAYA, JOHOR BAHRU
KC VOHRAH J
[CRIMINAL TRIAL NO. 5 OF 1985]
22 FEBRUARY 1990

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Circumstantial Evidence - Operation of presumptions under ss. 37(b), (d), (g), (da) of the Dangerous Drugs Act - No evidence to show that accused is the sole occupier of premises - No evidence to show that accused had care and management of premises at material time - No concealment of drugs found - Presumptions cannot apply.*

The accused was charged with trafficking in a dangerous drug under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act").

A police party had been instructed to raid a house known as No. 76 Kg Poh Cher Leng in Skudai ("the house"). They then proceeded to Skudai where they saw a Volvo bearing registration number PM 8654 ("the car") driven by the accused. The police party had earlier on been keeping surveillance on the car. The car was stopped and the accused arrested. The police party and the accused then went to the house. The accused's wife was in the house. The police made a search and in the presence of the accused and his wife found in the kitchen area 4 cardboard boxes and a wooden box all containing what appeared to be slabs of raw concrete. Photographs were taken and a search list was issued. The accused's wife was also arrested and both were then handed over to the investigating officer of the case. Upon analysis it was discovered that the slabs of suspected raw opium were found to contain 116.608 kilograms of raw opium.

The police had prior to the arrest been keeping surveillance on the house. One of them testified that he saw the accused leave the house and that between this time and the time the police party returned with the accused, nobody left or entered the house.

Apart from the opium slabs, the police recovered from the house telephone bills and electricity bills both in the accused's name.

At the end of the prosecution's case, Counsel for the accused submitted that the prosecution had not made out a *prima facie* case. He submitted that the evidence against the accused was only circumstantial and that the prosecution had to rely on the presumptions found in ss. 37(b), (d), (g) and (da) but contended that none of these could apply.

Held:

[1] On the basis of *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11 as adumbrated in *Munusamy v. PP* [1987] CLJ (Rep) 221 the question for the Court to decide at the end of the prosecution's case is whether there was some evidence, not inherently incredible which if were to be accepted as accurate, would establish each essential element in the alleged offence.

[2] The essential element which had to be established against the accused was that he was in possession of the raw opium that was recovered in the house and the charge of trafficking against him would only arise if the quantity of raw opium amounted to 1000 gm or more in weight as laid down in presumption (da) enabling trafficking to be presumed once possession had been attributed to the accused.

[3] It is clear from the evidence that at the time of the recovery of the raw opium, the accused's wife was actually the only adult in physical occupation of the premises and she therefore was the person who appeared at that material time to have the custody and control of the raw opium.

[4] The facts proved/shown by the telephone and electricity bills by themselves do not afford sufficient ground for the operation of the presumption under s. 37(b) of the Act as no evidence was adduced to indicate that it was not the wife who had the care and management of the house or control of the incriminating items so that either one of them or the other could have been the occupier of the house.

[5] Even if the facts did establish grounds for the operation of the presumption against the accused, the fact that the boxes containing the slabs were not concealed but were open to sight and easily retrievable would prevent the operation of s. 37(g) of the Act so that the accused even as occupier could not be presumed to have knowledge of the drugs for the presumption under s. 37(d) to apply.

[6] As a matter of law, the prosecution has not made out a *prima facie* case against the accused.

[Accused acquitted and discharged.]

Cases referred to:
Haw Tua Tau v. PP [1981] CLJ (Rep) 11
Munusamy v. PP [1987] CLJ (Rep) 221

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a), 37(b), (d), (g), (da)

For the prosecution - Saufee Affandi b. Mohamed DPP
For the accused - Mohamed Noor bin Don; M/s. Mohamed Noor Don & Associate

JUDGMENT

KC Vohrah J:

The accused person was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 in that he on 1 September 1984 at about 3.25p.m. at house No. 76, Kampong Poh Cher Leng, Skudai, Johor Bahru did traffic in raw opium weighing 116.608 kilograms.

As adduced by the prosecution the relevant facts briefly were as follows. On 1 September 1984 at about 2.40 p.m. Supt. Nathan Ha (PW2) who was then the head of the Anti-Narcotics Department for the State of Johor briefed his officers regarding a raid to be conducted at house No. 76, Kg. Poh Cher Leng in Skudai. At about 3.00p.m. the same day PW2 proceeded with his officers to Skudai. At about 3.20p.m. at Skudai the police party saw a Volvo car bearing registration No. PM.8654, over which they had been keeping surveillance, approaching their direction. The car was driven by the accused. Insp. Lokman Hakim (PW5) then stopped the motor-car, arrested the accused and handed him over to PW2. The police party together with the accused then proceeded to house No. 76 Kg. Poh Cher Leng. On arrival at the house, they met the accused's wife and a child aged about 10 years. PW2 and a few of his men then conducted a search of the house in the presence of the accused and his wife and found in the kitchen area 4 cardboard boxes (P3, P5, P9 and P11), and 1 wooden box (P12) containing what appeared to be slabs of raw opium. P3 sealed with masking tape was lying on the floor underneath a table and contained 18 slabs; P5 sealed with masking tape was

placed underneath a concrete platform and contained 14 slabs; P9 sealed with masking tape was lying on top of the wooden box P12 inside an adjacent unused bathroom and contained 11 slabs; P11 was lying on the floor beside P9 inside the bathroom and contained 16 slaps; and P12 was on the floor of the bathroom and contained one solitary slab. Photographs were taken of all these items at the spots they were found and PW2 then took possession of them and issued a search list to the accused and the accused's wife. He also arrested the accused's wife. After marking all the items seized, PW2 brought them back together with the accused and his wife to the Anti-Narcotics Headquarters in Johor Bahru where the accused and his wife together with the seized items were handed over to ASP. Mohd. Ali bin Hj. Mohd. Yusof (PW7), the investigating officer of the case. The Government Chemist, Mr. Chang Eng Thuan (PW8), after analysing all the slabs of suspected raw opium seized found them to amount to 116.608 kilograms of raw opium within the meaning of s. 2 of the Dangerous Drugs Act 1952.

The evidence of PW5 and DPC Hairuman Ihsan (PW6) who were members of PW2's party that day showed that before the arrest of the accused the two of them together with DPC Rafek Yaakub had conducted surveillance of the house and the accused was seen coming out of the house and entering the Volvo car which was parked outside the gate of the house. As the accused drove away, PW5 and DPC Rafek followed the car on a motorcycle as it proceeded towards Skudai town. PW5's evidence was that the car stopped in front of a coffee shop whereupon he and DPC Rafek arrested the accused and surrendered him immediately to PW2 who had come up to them from the opposite side of the road 25 to 30 metres away. A search was made of the car but nothing incriminating was found in it. The police party together with the accused then proceeded to the house where a search was conducted of the premises. It was in the kitchen area that PW2 found the incriminating items. PW6's evidence was that from the moment he conducted surveillance of the house that afternoon up to the time when the police party returned to the house with the accused nobody left or entered the house. Apart from the slabs of raw opium recovered in the kitchen area PW2 also recovered a telephone bill (P27) and an electricity bill (P28) in respect of the house, both bills made out in the name of the accused.

At the end of the prosecution case, Counsel for the accused submitted that no *prima facie* case had been made out against the accused. Counsel argued that as the evidence against the accused was circumstantial the prosecution had to call in aid the presumptions under s. 37 of the Act, namely those found in subsections (b), (d), (g) and (da) but contended that none of these could apply. These presumptions read as follows:

> (b) a person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises;
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> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;
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> (da) any person who is found in possession of:
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> (i) 15 grammes or more in weight of heroin;
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> (ii) 15 grammes or more in weight of morphine;
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> (iii) 15 grammes or more in weight of monoacetylmorphines;
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> (iiia) a total of 15 grammes or more in weight of heroin, morphine and monoacetylmorphines or a total of 15 grammes or more in weight of any two of the said dangerous drugs;

(iv) 1,000 grammes or more in weight of prepared opium;

(v) 1,000 grammes or more in weight of raw opium;

(va) a total of 1,000 grammes or more in weight of prepared opium and raw opium;

(vi) 200 grammes or more in weight of cannabis;

(vii) 200 grammes or more in weight of cannabis resin;

(viii) a total of 200 grammes or more in weight of cannabis and cannabis resin;

(ix) 40 grammes or more in weight of cocaine; or

(x) 2,000 grammes or more in weight of coca leaves,

otherwise than in accordance with the authority of this act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

(g) if any dangerous drug is found to be concealed in any premises, it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises.

As regards the presumption under subsection (b) he submitted that it was necessary for the prosecution to have called the wife of the accused to establish the fact that she herself did not have the care and management of the house before the accused could be so presumed. Similarly he submitted the presumption under subsection (d) could not be invoked as there was no evidence from her to indicate that she had no knowledge of the raw opium in the kitchen area in order to negative the fact that she herself had custody or control of the incriminating items. In regard to the presumption under subsection (g) he argued that there was no concealment of the incriminating items to bring about its operation attributing knowledge to the occupier. The learned Deputy Public Prosecutor submitted that on the cumulative effect of the evidence produced that the telephone bill P27 and the electricity bill P28 were in the accused's name showing that the house belonged to him, that the accused was seen by PW5 and PW6 coming out of the house and entering the car alone, that the accused was arrested alone in the car after he had driven it into Skudai town and that the quantity of raw opium found was so large as to indicate that the accused must have known of its presence in the house, the presumptions under subsections (b) and (d) would necessarily apply and there was therefore a case for the accused to answer, He did not elaborate.

On the basis of *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11 as adumbrated in *Munusamy v. PP* [1987] CLJ (Rep) 221 the question I had to decide at the close of the prosecution case was whether there was some evidence, not inherently incredible. which if I were to accept as accurate, would establish each essential element in the alleged offence. The essential element which had to be established against the accused was that he was in possession of the raw opium that was recovered in the house and the charge of trafficking against him would only arise if the quantity of raw opium amounted to 1000 grammes or more in weight as laid down in subsection (da) enabling trafficking to be presumed once possession had been attributed to the accused.

It was clear on the evidence that at the time of the recovery of the raw opium in its five boxes stored in three different places in the kitchen area of the house, the wife of the accused was actually the only adult person in physical occupation of the premises and she therefore was the person who appeared at the material time to have the custody and control of the raw opium. Although the electricity bill P28 and the telephone bill P27 did state that the accused was the consumer of the electricity and hirer of the telephone at the house these

facts by themselves, in my view, did not afford sufficient ground for the operation of the presumption under s. 37(b) of the Dangerous Drugs Act as no evidence was adduced to indicate that it was not she who had care and management of the house or control of the incriminating items so that either the one or the other could have been the occupier of the premises. Even if the facts did establish ground for the operation of the presumption against the accused, the fact that the cardboard boxes containing the slabs of raw opium, according to the evidence, were not concealed but were open to sight and easily retrievable would prevent the operation of s. 37(g) of the Act so that the accused even as occupier could not be presumed to have had knowledge of the drugs for the presumption under s. 37(d) to apply.

I agreed with Counsel for the accused that as a matter of law no *prima facie* case had been made out against the accused. Accordingly I acquitted and discharged the accused.

Also found at [1990] 2 CLJ 83